Office - Supreme Court, U. S.
FILED
DEC 20 1943
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 551

CURACAO TRADING CO., INC.,
Petitioner,

against

FEDERAL INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THEODORE E. WOLCOTT,
Counsel for Petitioner,
60 East 42nd Street,
New York City.

ACKERMAN PRESS, Inc., 202 East 44th St., Phone VAnderbilt 6-1898

INDEX.

	PAGE
Petition	1
Summary Statement Of The Matters Involved	2
The Decision Below	6
Jurisdiction	7
Questions Presented	8
Reasons For Granting The Writ	8
Brief	10
Opinions Below	10
Jurisdiction	10
Statement Of The Case And Questions Presented	10
Specification Of Assigned Errors	10
Argument	12
POINT I.—The issues as to the validity of the warehouse receipts and the ownership of the cocoa beans were substantial issues of fact. The proof presented by the respondent and accepted by the Court was inadmissible and contradicted	12
POINT II.—The reclamation proceeding orders are not binding on petitioner and are inadmissible	14
POINT III.—The nature and extent of agency of Stake to enter into an insurance contract on behalf of Federal Insurance Company and make representations with respect thereto are issues of fact, particularly where, as the Court below found, there is substantial documentary as well as oral proof submitted in support of petitioner's allegations	15
POINT IV.—The nature of the insurance contract and the meaning of "non-delivery" could only be determined in light of the surrounding circumstances, particularly where the intended meaning and coverage of "non-delivery" had been agreed upon by the parties and relied upon by the petitioner in risking $110,000	17
Conclusion	21

TABLE OF CASES.

PAGES

Aetna Casualty & Surety Co. v. *National Bank of Tacoma*, 59 F. (2d) 493 ..... 17, 18
Aetna Ins. Co. v. *Willys Overland, Inc.*, 288 F. 912 15
Amory v. *Gilman*, 2 Mass. 1 19
Aldrich v. *New York Life Ins. Co.*, 235 N. Y. 214 17

Berry v. *A. C. Ins. Co.*, 132 N. Y. 49 20
Bowman v. *Loperena*, 311 U. S. 262 7
Brown v. *Fletcher's Estate*, 210 U. S. 82 15
Buck v. *Chesapeake Ins. Co.*, 1 Pet. 151 20
Bushey & Sons v. *American Ins. Co.*, 237 N. Y. 24 17

Coleman v. *Eyre*, 45 N. Y. 38 18
Columbian Ins. Co. v. *Lawrence*, 2 Pet. 25; 10 Pet. 507 ..... 19, 20
Compania de Navagacion v. *Insurance Co.*, 277 U. S. 66 17
Corporation of Royal Exchange Assurance v. *United States*, 75 F. (2d) 478 18
Craufurd v. *Hunter*, 8 D. & D. 13 20
Cummings v. *Ins. Co.*, 55 N. H. 457 19

Driggs v. *Dean*, 167 N. Y. 121 12

Empire Development Co. v. *Title Guarantee & Trust Co.*, 225 N. Y. 53, 121 N. E. 468 20
Etting v. *Bank*, 11 Wheat. 59 13

Fireman's Fund Ins. Co. of Cal. v. *Vinton*, 190 N. Y. S. 525 17

Garelick v. *Rosen*, 274 N. Y. 64 17
Golden v. *Romer*, 20 Hun 438 12
Gypsy Oil Co. v. *Escoe*, 275 U. S. 498 7

Herrman v. *New England Navigation Co.*, 143 App. Div. 551 12
Hoffman v. *Aetna Ins. Co.*, 32 N. Y. 405 17
Hooper v. *Robinson*, 98 U. S. 528 20

Ingersoll v. *Coram*, 211 U. S. 335 15

PAGES

Johnson v. *Lutz*, 253 N. Y. 124 14

Kittredge v. *Grannis*, 236 N. Y. 375 14

Little & Christman v. *General Ins. Co. of America*, S. D. N. Y., Civ. 8-500 14

Lucena v. *Craufurd*, 2 Bos. & Pul. 269 20

Maryland Casualty Co. v. *Washington Loan & Banking Co.*, 145 S. E. 761, 61 A. L. R. 331 20

Merchants National Bank v. *Roxbury Distributing Co.*, 196 F. 76 12

National Bank of Tacoma v. *Aetna Casualty & Surety Co.*, 296 Pac. 831 18

Nat'l Filtering Oil Co. v. *Citizens' Ins. Co.*, 106 N. Y. 535 20

Nellis v. *Western Life Indemnity Co.*, 207 N. Y. 320 17

Nickelson v. *Nestles Milk Products Corp., Inc.*, 107 F. (2d) 17 14

Norris v. *Alliance Ins. Co. of Phila.*, 123 A. 762 17

Ohio Cas. Ins. Co. v. *Callaway*, 134 Fed. (2) 788 16

Palmer v. *Hoffman*, 318 U. S. 109 14

Phoenix Ins. Co. v. *Erie Transportation*, 117 U. S. 312 ... 20

Provident Trust Co. v. *Nat'l Surety Co.*, 44 F. Supp. 514 20

Pritchard v. *Com. Fire Ins. Co.*, 203 S. W. 244 16

Rohrbach v. *Germania Fire Ins. Co.*, 62 N. Y. 47 20

Ryan v. *United States*, 19 Wall. 514 ..... 18, 20

Saverese v. *Hartford Fire Ins. Co.*, 123 A. 763 17

Stock v. *Inglis*, 12 Q. B. 564 20

Strochmann v. *Mutual Life Ins. Co.*, 300 U. S. 435 17

Traders Ins. Co. v. *Newman*, 120 Ind. 544, 22 N. E. 428 19

Troxell v. *Delaware, Lackawanna & Western Railroad Co.*, 227 U. S. 443 15

United States v. *Seminole Nation*, 299 U. S. 417 7

West v. *Smith*, 101 U. S. 270 13

STATUTES AND AUTHORITIES CITED.

PAGES

Cooley's Briefs on Insurance, Vol. 1 19

Judicial Code, Section 240 (a) as amended by the Act of February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938 (U. S. C. A., Title 28, Section 347 [a]) 7

New York Insurance Law, former Sec. 169 20

Supreme Court of the United States

OCTOBER TERM, 1943.

CURACAO TRADING CO., INC.,

Petitioner,

against

FEDERAL INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Curacao Trading Co., Inc., prays that a writ of certiorari issue to review the decision and judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on August 18, 1943, affirming a judgment of the United States District Court, for the Southern District of New York, granting respondent's motion for summary judgment under Rule 56 and dismissing the complaint on the merits.

Petition for rehearing by that Court was denied on September. 22, 1943, on which day the order and judgment was entered.

Summary Statement Of The Matters Involved.*

This is an action by the petitioner, Curacao Trading Co., Inc. ("Curacao"), on its own behalf and as assignee of the Grace National Bank ("Bank") against respondent, Federal Insurance Company ("Federal"), upon a contract of insurance, both oral and written to cover certain risks arising out of a loan transaction involving warehouse receipts for cocoa beans as collateral security, in which it is alleged that petitioner relying upon such insurance as primary security upon notice to that effect to respondent proceeded with the deal and suffered a loss of $110,000 arising out of risks covered.

The Facts.

Petitioner is engaged in the business of exporting and importing commodities, including cocoa beans (624). The respondent, "Federal", is a New Jersey insurance company, licensed and authorized to do business in the State of New York (625). William A. Stake & Co. ("Stake") is a corporation duly licensed as an insurance broker and insurance agent. For many years petitioner had purchased insurance from respondent through Stake, who acted as agent for Federal (99-105). The insurance with respondent, among which was an open import policy #0-54711 issued in 1935 (Complaint, Ex. E, Tab 27, to which many indorsements were thereafter added; Tabs 40-66) premiums paid by appellant to respondent amounted to more than $90,000; Stake and Federal were experienced in the field of insurance and were relied upon by the appellant as such and were familiar with appellant's business and insurance requirements (101, 217).

*Figures in parentheses refer to folio numbers in the record. Emphasis wherever the same appears is our own. Upon stipulation, printing of most of the exhibits was dispensed with. They will be found in a separate *Exhibit Volume* in which the exhibits are additionally identified with numbered tabs.

Immediately prior to the 31st day of March, 1939, the petitioner conferred with the respondent, through its agent, Stake (by its vice-president, James Christie), and informed it that petitioner was contemplating entering into a deal whereby petitioner was to do certain financing in an amount of approximately $90,000; it wanted to find out from respondent whether it would supply all of the insurance protection and coverage petitioner needed to fully secure itself and its bank.

The projected deal as outlined to the respondent was as follows.

Petitioner was to advance a sum of about $90,000 to a third party, Garcia Sugars Corporation ("Garcia") and receive therefor certain warehouse receipts (Tabs 23, 24, 25) providing for the delivery of cocoa beans, which receipts were to be issued by Harbor Stores Corporation ("The Warehouse"); that petitioner would sell on the New York cocoa Exchange for the account of Garcia, the equivalent quantity of cocoa for future delivery (628). Garcia was to liquidate such sales in the months hedged, and in default thereof, petitioner was to tender and deliver cocoa beans to comply with said future delivery contract. The petitioner in turn was to obtain the funds from its bank, the Grace National Bank ("The Bank"), and pledge as collateral security therefor the warehouse receipts and the insurance policy or other evidence of insurance that it would receive from the respondent (708-711; 87-93; 205-211, 221).

Petitioner stated to respondent that it had no knowledge, opinion or belief as to the reliability of the warehouse, the validity of the warehouse receipts, the title of the warehouse to the cocoa beans, the honesty of the warehouse, the ownership of the cocoa beans or other interest therein of Garcia, and further that it had been rumored that Garcia had an interest in Insular Terminal Corporation, the predecessor of Harbor Store Corporation, the owner of

the warehouse, and that petitioner wanted to be insured against all risks and liabilities that petitioner was exposed to in the transaction including the obligation of the warehouse to deliver the beans pursuant to the warehouse receipts, otherwise it would not enter into the deal.

After consultation between Christie and Bonner (underwriter of respondent) in which Christie fully informed Bonner of the nature of the insurance petitioner required (208-211; 226-237), the respondent thereupon represented, agreed and warranted that appellant would be and was fully covered against any and all risks including those aforementioned, and stated that the appellant could go ahead with the deal and could rely upon the fact that it had full insurance protection of the aforementioned risks; that if the beans were not delivered to petitioner, then petitioner would be protected (210-212, 221; 87-92). It stated that when the insurance policy or certificate was issued, it could be delivered to the bank and that both the appellant and the bank could rely upon it as evidence of the insurance security (87-92; 207, 329, 331); and that all that remained to be done was for the appellant to furnish the respondent with a description of the warehouse receipts and the amount of the loan (205-207; 237); the respondent issued a certificate of insurance (Tab 26) to be given to the bank (211) as evidence of the "pre-attachment of the insurance" (222), and as its security (178). (It should be noted that the form of the insurance was to be selected by respondent.)

The petitioner relying upon the foregoing, entered into an agreement in writing with Garcia (762), obtained the warehouse receipts which were issued directly by the warehouse to plaintiff (Exs. A, B and C of Complaint, Tabs #23, 24 and 25) and in exchange for a loan of $90,000.00 delivered them to the bank together with a certificate of insurance issued and countersigned by Stake on behalf of respondent (Ex. D of Complaint, Tab #26), and gave

the bank a trust receipt for the warehouse documents (Ex. C, Tab #38). Petitioner then made contracts for the future delivery in September of the cocoa beans to third parties (94).

About May 24, 1939, an involuntary petition in bankruptcy was filed against Garcia in the District Court. Garcia was adjudicated a bankrupt on or about the 7th day of June, 1939 (645), and wholly failed to perform its agreement and failed to liquidate the future delivery contracts (646). Harbor Stores Corporation after a voluntary petition, was adjudicated a bankrupt on or about May 31, 1939 (648). Demand for the delivery of the cocoa beans was made, pursuant to the warehouse receipts, and delivery refused (648-649).

On or about June 15, 1939 petitioner filed a petition for reclamation in the warehouse bankruptcy proceedings, seeking delivery from the receivers of 18,480 bags of cocoa beans, which petition was dismissed on or about August 8, 1939 (650). Petitioner in the meantime repaid the bank and became subrogated to its rights by way of assignment.

The petitioner being unable to fulfill its future delivery obligations was under the rules of the New York Cocoa Exchange (743) obliged to repurchase such future delivery contracts and suffered a loss amounting in all to $109,647.18 (95; 645).

Respondent's claim is lack of insurable interest in that petitioner at the time of the insurance contract herein did not own an interest in the cocoa beans and that the warehouse receipts were not validly issued. This defense not only raises issues of fact, but is not as broad as the insurance contract sued upon.

The Decision Below.

The Court below affirmed on the ground that the insurance contract was one for property insurance only and that petitioner did not own the cocoa beans insured and therefore had no insurable interest. The Court below erroneously treated petitioner's claim as based upon alleged insurance of spurious warehouse receipts. But petitioner does not claim or admit the receipts were spurious but claims that the warehouse failed to deliver the beans on demand, and therefore respondent is liable. The respondent's contention of non-ownership and spurious receipts at most created issues of fact.

However, as was stated to the Court below, regardless of whether the insurance covered property, property rights or contract rights or obligations, material issues of fact were involved that were fundamental, and until these basic conflicts were resolved by a complete jury trial, as was petitioner's right, there could be no fair and valid determination of this action.

These material issues of fact involved:

1. The validity of the warehouse receipts.

2. The ownership of the cocoa beans.

3. The nature and extent of agency of Stake with respect to Federal.

4. The construction of the word "non-delivery" in the insurance certificate in light of the surrounding circumstances and the intent of the parties.

5. The representations and warranties made by Stake on behalf of Federal.

The decision of the Court below rests upon (a) disregard of the presumptive validity of the warehouse receipts; (b)

Questions Presented.

1. Are there issues of fact presented which may not be determined by the Court on affidavits alone on a motion for summary judgment?

2. Was the finding that the warehouse receipts were invalid based upon inadmissible evidence? Apart from the question of inadmissibility, was this finding drawn from conflicting evidence?

3. Was the finding that the plaintiff did not own the cocoa beans at the time of the making of the insurance contract herein (or at any time) based on inadmissible evidence? Apart from inadmissibility, was this finding drawn from conflicting evidence?

4. Was the reclamation order res adjudicata and binding on the petitioner herein?

5. Was the interpretation of the meaning of the word "non-delivery" a question of fact to be determined by a jury in the light of surrounding circumstances and the orally expressed agreement and intent of the parties as to its meaning?

6. Did plaintiff have an insurable interest regardless of the ultimate ownership of the beans because of its undisputed financial risk in the transaction?

Reasons For Granting The Writ.

The Court below has arbitrarily assumed powers to decide conflicting issues of fact which were not granted to it under the Federal Rules of Civil Procedure and are prohibited by the Constitution of the United States. In doing this it has disregarded fundamental rules of interpretation of insurance contracts to the effect that surrounding circumstances should be inquired into in order to interpret the meaning of a phrase and to determine the nature of the insurance contract.

The Court in doing this has also ignored the well established rule of *contra proferentem*. In the same manner the Court below has resolved issues of fact as to the nature and extent of the agency of Stake. The procedure of the Circuit Court rested upon further fundamental errors in receiving into evidence inadmissible matter which were hearsay and contradicted by the same witness or affiant. The determination of the Circuit Court of Appeals is in conflict with the decisions of this Court and of various other Circuit Courts of Appeal as well as of the Courts of the State of New York as will be shown in our brief.

It is respectfully submitted that the Court below has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the lower Court as to call for the exercise of this Court's power of supervision.

We believe the summary disposition of this case in the lower Courts is symptomatic of a misinterpretation of Rule 56 and of a trend to "trial by affidavit" and unless this present trend in the Federal Courts is checked, the Federal Courts of justice will become increasingly summary and administrative rather than plenary and judicial as is required by our Constitution. The questions here presented are novel and of extreme importance to the business and insurance world.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the Circuit Court of Appeals before the Second Circuit should be granted.

Respectfully submitted,

CURACAO TRADING CO., INC.,
By THEODORE E. WOLCOTT.

THEODORE E. WOLCOTT,
Counsel for Petitioner.

Dated, New York, December 10, 1943.